In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1005

STEPHEN H. PAYSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 24, 1957, a Navy Selection Board was convened to review the records of certain officers in the Civil Engineer Corps of the Navy who were eligible for promotion to the grade of captain. The Board found that petitioner and two others were not qualified for continued service in the Navy (they had not performed satisfactorily in their present grade and would not satisfactorily perform the duties of a higher grade). The Chief of Naval Operations concurred in the report, which was thereafter approved by the Secretary of the Navy, the Secretary of Defense, and, finally, the President. Consequently, petitioner, who had less than twenty years of service,

210-484—66

was honorably discharged from the Navy on July 18, 1958. He then brought suit for a declaratory judgment in the district court alleging that the Board's decision was a nullity because (1) it was arbitrary and capricious and without basis in his military record and (2) petitioner had completed twenty years of commissioned service and was therefore not subject to removal by a selection board. On cross-motions for summary judgment, the district court entered judgment for the government. The court of appeals affirmed (*Payson* v. *Franke,* 282 F. 2d 851 (C.A.D.C.)), holding, *inter alia,* that petitioner had not achieved twenty years' service, and that his separation from the service had been properly accomplished. While noting that it was not its function "to reassess the appellant's performance record," the court of appeals stated that "[v]arious references therein may well have appeared to an expert body [the Selection Board] to suggest an adequate basis for the conclusion which was reached" (282 F. 2d at 854). A petition for a writ of certiorari was denied on February 20, 1961 (365 U.S. 815).[1]

Petitioner then applied to the Board for Correction of Naval Records to have his record changed to show that he had been retained on active duty until completion of twenty years' duty and had retired voluntarily under 10 U.S.C. 6325. His application was denied on March 27, 1964. On June 30, 1964, he filed suit in the Court of Claims to recover active duty pay from July 1,

[1] Petitioner had filed his petition along with James B. Robinson, another discharged naval officer.

1958, to the date of judgment (less severance pay which he had received). Petitioner alleged that his discharge from the Navy was invalid, and that the action of the Board for Correction of Navy Records was arbitrary and capricious. On the government's motion for summary judgment, the Court of Claims dismissed the action except that portion of the claim for the period between July 1, 1958, and the date of petitioner's discharge (Pet. App. 7). Petitioner's motion for rehearing was denied on November 12, 1965 (Pet. App. 8).

The Court of Claims properly rejected petitioner's claim for active duty pay for the period subsequent to his separation from the service. His right to such relief is wholly dependent on whether he was legally discharged. That question was decided against him in the previous district court suit, and petitioner is barred from relitigating it in the Court of Claims. See *McGinty* v. *United States,* 151 Ct. Cl. 399, 403, certiorari denied, 368 U.S. 867. Cf. *Commissioner* v. *Sunnen,* 333 U.S. 591, 597–598. The bar was not lifted simply by reason of the fact that petitioner—after the action of the Selection Board which was the subject of judicial review—submitted his case to the Correction Board for further administrative consideration. Since the Correction Board's adverse decision on petitioner's application added nothing to the prior adverse final judgment in the district court suit, it could not serve as a basis for re-trying the merits of the cause of action "stemming from the same events or transactions." See *Friedman* v. *United*

States, 310 F. 2d 381, 400–401 (C. Cls.), certiorari denied *sub nom. Lipp* v. *United States,* 373 U.S. 932. In these circumstances, there is no sound reason for failing to apply the normal principles of *res judicata* and collateral estoppel. *Ibid.*

Petitioner points out (Pet. 3) that the Correction Board acted favorably on the application of former Commander Robinson who had also been involuntarily separated from the Navy. Petitioner seems to suggest, but does not argue, that this factor establishes an independent ground for reviewing the Correction Board's decision to determine whether petitioner, whose record was similar to Robinson's, was arbitrarily denied relief. The short answer is that the decision in Robinson's case does not affect petitioner's rights. There are always differences in individual records which the Correction Board may take into account in determining if military action, although legally proper, was unjust under particular circumstances. In petitioner's case, the Board concluded that petitioner failed to demonstrate an injustice warranting corrective action. That was a matter committed solely to it.[2]

It is therefore respectfully submitted that the petition for certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1966.

[2] The courts have no comparable discretionary equity power in reviewing military decisions or Correction Board decisions. Judicial review is limited to the question whether the military agency followed the pertinent procedural and substantive rules. See *Creary* v. *Weeks,* 259 U.S. 336.

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